TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-814

DELTA AIR LINES,
Petitioner,

v.

ROSEMARY AUGUST,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

The Equal Employment Advisory Council ("EEAC"), with the consent of all parties, respectfully submits this brief as Amicus Curiae.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, pro-

edures, and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity, whose combined experience gives the Council a unique competence and understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members, or their constituents, are subject to the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981 and the various other federal orders and regulations pertaining to nondiscriminatory employment practices. As such, they have a direct interest in the issue presented for the Court's consideration in this case, namely, whether the mandatory procedure of Rule 68[1]

is inapplicable, however, and merely because Title VII litigation is involved.

As a significant part of its activities, EEAC has participated as amicus curiae in a number of cases before this Court which involved procedural issues under Title VII. See, e.g., *General Telephone Company of the Northwest, Inc., et al. v. EEOC*, 48 U.S.L.W. 4512 (U.S. May 12, 1980); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *Mohasco Corp. v. Silver*, 48 U.S.L.W. 4851 (U.S. June 23, 1980); *Delaware State College v. Ricks*, 605 F.2d 710 (3d Cir. 1979), *cert. granted*, 48 U.S.L.W. 3535 (U.S. Feb. 19, 1980).

SUMMARY OF ARGUMENT

The Seventh Circuit's ruling, which denied the prevailing defendant Company its costs despite the proper tender of an offer of judgment pursuant to Rule 68 of the Fed. R. Civ. P., incorporates a serious misreading of the federal district court rule and, unless overturned, threatens to discourage settlement, promote litigation and generate inconsistency in the federal procedural framework. Moreover, the court's decision is particularly incongruous because it de-

[1] Fed. R. Civ. P. 68 reads as follows:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order of judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

parts from the plain wording of the federal rule purportedly to accommodate the overriding interests reflected in Title VII when, in fact, those interests would best be served if the rule were read and applied as written.

The language of Rule 68 is not obscure or ambiguous. It permits a defendant to make an offer of judgment to settle a claim, and if the offer is not accepted within ten days and the plaintiff fails to obtain a more favorable judgment at trial, the rule specifies that the plaintiff "must" pay costs of trial from the time of the offer. The manifest purpose underlying the rule is to encourage settlement by providing a carefully balanced system of rewards and punishments. Rule 68 is classified under Part VIII of the Fed. R. Civ. P., entitled "Provisional and Final Remedies and Special Proceedings," and is directed as much toward promoting the public benefits that flow from a speedy resolution of lawsuits as toward satisfying the expectation of private parties. It should not be confused with Rule 54(d), under Part VII of the Fed. R. Civ. P. ("Judgment"), which permits the trial court in its discretion presumptively to award costs to the prevailing party. Rule 54(d) is not a tool for expediting litigation; rather, it is concerned with consequences which typically will hinge upon the merits of a case, and because of its discretionary language, contains within it the implication that elements of good faith may enter into the decision.

Until the decision of the Seventh Circuit below, lower federal courts had applied the clear language of Rule 68 consistently to award costs to prevailing defendants who had made Rule 68 offers. *Mr.*

Hanger, Inc. v. *Cut Rate Plastic Hangers, Inc.*, 63 F.R.D. 607 (E.D.N.Y. 1974), and *cases therein cited.* Moreover, the courts had been careful to distinguish between the operation of Rules 54(d) and 68, while at the same time acknowledging the appropriateness of both rules to Title VII litigation. *Dual* v. *Cleland*, 79 F.R.D. 696 (D.D.C. 1978). The opinion of the court of appeals expresses no justification which would warrant its unprecedented departure from the language and operation of Rule 68 for Title VII litigants. Its imposition of a "good faith" standard has no basis in the rule and, in light of the adverse consequences defendants could suffer from offers of judgment accepted and publicly recorded, is in any event unnecessary. The court's reference to provisions governing the award of attorney's fees to determine Rule 68 applicability merely confuses the rule with that of a different rule to the detriment of the parties and of the courts.

Rule 68 advances an important public interest: to encourage parties to settle a case as early as possible by giving the defendant an incentive to make an offer and the plaintiff an incentive to accept. This interest is no less important under Title VII, where the non-litigative tools of conference, conciliation, persuasion and settlement play a crucial role in the statutory enforcement scheme.

ARGUMENT

RULE 68 IS A MANDATORY COST-SHIFTING PROVISION, AND THE COURT OF APPEALS' DECISION TO TRANSFORM IT INTO A DISCRETIONARY PROVISION IN TITLE VII SUITS VIOLATES ITS PLAIN WORDING AND DESTROYS ITS EFFECTIVENESS AS A VALUABLE TOOL TO PROMOTE SETTLEMENT

A. Rule 68 and its Role Within the Federal Civil Procedure Scheme

Rule 68 specifies that if the defendant makes an offer of judgment which is rejected, and the plaintiff fails to obtain a more favorable judgment at trial, the plaintiff *must* pay the costs of trial from the time of the offer. The question here is whether the provisions of the rule is inapplicable whenever, and merely because, Title VII litigation is involved.

For 33 years, Rule 68 has been acknowledged as an instrument "to encourage settlement and avoid protracted litigation." Fed. R. Civ. P. 68, Advisory Committee Note on 1946 Amendments, 28 U.S.C.A. (West 1970). *Maguire v. Federal Crop Ins. Corp.*, 9 F.R.D. 240 (W.D. La. 1949). Accordingly, courts have ruled that whenever a plaintiff does not obtain a judgment exceeding an offer made by the defendant, the cost-shifting provision becomes operative and the judge loses the discretion he normally has to deny costs to the defendant. *Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc.*, 63 F.R.D. 607, 610-11 (E.D.N.Y. 1974); *Deal v. Cleland*, 79 F.R.D. 696 (D.D.C. 1978). The reason for the mandatory language is patent: the defendant will seek settlement of a case by paying a sum certain to the plaintiff, without any

determination of liability by a court, only if it is given a realistic inducement.

Apparently unnoticed by the Seventh Circuit,[*] are the different roles played by Rules 68 and 54(d)[**] in the litigation process. Rule 54(d), which is included within Part VII ("Judgment") of the Fed. R. Civ. P., grants almost unreviewable discretion in the district court to award or to disallow costs to the prevailing party. See *Farmer v. Arabian American Oil Co.*, 379 U.S. 227 (1964). And, "[i]n determining whether costs should be allowed the court must consider the equities and public interests at stake." *County of Suffolk v. Secretary of Interior*, 76 F.R.D. 469, 472 (E.D.N.Y. 1977). Inherent in the court's calculation will be good faith considerations, particularly where public laws designed to promote significant societal interests are involved.

Rule 68, on the other hand, is designed specifically to encourage parties to *cut off* litigation. As written,

[*] "The court of appeals acknowledged the company's argument that unless Rule 68 is followed strictly according to its terms, the rule will overlap the trial judge's express discretion under Rule 54(d), 600 F.2d at 701. Despite the "force" of this argument, the court concluded without analysis, it was "not persuaded." *Id.*

[**] Fed. R. Civ. P. 54(d) reads as follows:

> Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

the rule, which is classified not under "Judgment," but under "Provisional and Final Remedies and Special Proceedings" (Part VIII of the Fed. R. Civ. P.), is designed to encourage settlement, *even though the equities of a case may favor a more substantial judgment than that agreed to by the parties.* The rule does not contemplate a good faith evaluation, for so long as there is no breach of professional ethics, parties *should* perceive the rule as advantageous to their cause and, for the benefit of the court system as well as for themselves, engage in such offers.

If, as in the view of the Seventh Circuit, Rule 68 is construed merely as a restatement of Rule 54(d), offers of judgment would cease to be made. The inevitability of this conclusion follows from an understanding of how Rule 54(d) operates, and why its operation could not be adapted to Rule 68 situations. To take one illustration, in a case brought by representatives of the public challenging governmental action allegedly threatening the environment, the district court reasoned that under Rule 54(d), costs should be denied to successful defendants where cost-related equities favor the plaintiffs. Among the questions the court declared it would weigh were the following: (1) was the action brought and carried forward in good faith; (2) did its prosecution provide direct or indirect benefits to the public; (3) did it result in direct or indirect benefit to defendants; (4) were novel and substantial issues of law or fact resolved; (5) are costs required to reimburse needy defendants; (6) will the costs unduly burden non-affluent plaintiffs; (7) and will imposition of costs unduly inhibit future challenges to environmental decisions, thus reducing the effect of substantive environmental protections? *County of Suffolk* v. *Secretary of Interior*, 76 F.R.D. 469 (E.D.N.Y. 1977). While these may be proper kinds of factors for the district court to consider after having had a trial on the merits, no party ever is likely to make an offer of judgment to settle a case if, even to settle a case before trial, it must undertake such an extensive showing. Thus, the rewriting of Rule 68 by the Seventh Circuit, if allowed to stand, would effectively nullify its provisions.

While the court of appeals made no attempt to reconcile its decision with the plain wording of the rule, it intimated that "a technical interpretation of a procedural rule" should not be permitted in Title VII cases because it would "chill" the pursuit of the goals incorporated in that statute. 600 F.2d at 701. As we will show below, even if a departure from the rule could be justified on such grounds, these concerns are without foundation; indeed, disregarding Rule 68 would be antithetical to the purposes of Title VII.

B. The Role of Rule 68 in Title VII Litigation

The importance and weight of the procedural requirements embodied in the Federal Rules are reflected in the precise and complex manner Congress deliberately chose for promulgating and amending those Rules. *See* 28 U.S.C. § 2072. A departure from the Rules, especially one completely abrogating an entire rule for an entire class of lawsuits, is not lightly to be inferred from an Act of Congress that does not explicitly amend the Federal Rules or, indeed, even mention Rule 68.

The Seventh Circuit, without analysis of the statute and its legislative history, concluded that Title VII requires that Rule 68, contrary to its language, be read to mean that the awarding of costs under the rule is discretionary, rather than mandatory. Yet, an examination of Title VII reveals that the mandatory nature of the rule promotes Title VII policy.

Initially, it should be noted that when it originally enacted Title VII in 1964, Congress expected that the majority of discrimination cases would be resolved outside of court. See Senate Comm. on Labor & Public Welfare, 92d Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act of 1972, at 414 (1972) ("Legislative History"). In adopting the 1972 amendments to Title VII, moreover, Congress intended that "direct Federal enforcement" (118 Cong. Rec. 4941 (1972)), rather than private litigation, would serve as the primary means of achieving compliance. 118 Cong. Rec. 7168 (1972).[1] See *Occidental Life Insurance Co. of Calif.* v. *EEOC*, 432 U.S. 364, 368 (1977).

[1] Implicit in the 1972 amendments is the premise of the general applicability of the Federal Rules of Civil Procedure, and conspicuous by its absence is any evidence that Congress intended to alter the procedural requirements otherwise applicable to private civil actions under Title VII. Congress assumed the general applicability of the Federal Rules, *Legislative History* at 201, 221, 226, 278, 807, 1003, 1429, 1485. This Court has recently eschewed the suggestion that the Federal Rules generally are inapplicable to Title VII actions. See *General Telephone Co. of the Northwest, Inc., et al.* v. *EEOC*, 48 U.S.L.W. 4513, 4517, n.16 (U.S. May 13, 1980), *citing Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 424 (1975).

To be sure, private suit not only is recognized and provided under Title VII, but is acknowledged to "involve the vindication of a major public interest." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 778 n.40 (1976), quoting Section-By-Section analysis of H.R. 1746, accompanying the Equal Employment Opportunity Act of 1972—Conference Report, 188 Cong. Rec. 7166, 7168 (1972). Nevertheless, the statutory emphasis upon "informal methods of conference, conciliation and persuasion," Civil Rights Act of 1964, § 706(a), underscores a statutory design that is framed with the intention of reducing resort to litigation. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). One of the most effective tools for promoting settlement and reducing litigation is Rule 68. As a mechanism intended not to shape or promote litigation, but to avoid it, the rule serves a crucial public purpose of Title VII: to promote the efficient settlement of equal employment opportunity claims.

Other practical considerations compel a straightforward application of Rule 68 to Title VII suits. In an area of the law which is exceedingly complex, and where the governing legal principles are evolving rapidly, successful Title VII defendants incur ever-expanding legal costs to assist the courts in determining the proper interpretation of the requirements of Title VII. The successful defense against Title VII allegations which are proved meritless is extremely burdensome, even to larger employers who may have to make substantial adjustments to finance such litigation, often by increasing costs to con-

sumers.[8] A Rule 68 offer of judgment, which compels plaintiffs to evaluate their claims realistically, is one of the few procedural devices available to a defendant which enables it to reduce the costs of litigation, especially in circumstances where it views the plaintiff's claims as meritless.

C. The Reasons Advanced By The Lower Courts For A Non-Literal Reading of Rule 68 Are Either Inapposite To This Case or Intrinsically Insubstantial

Assuming, *arguendo*, that circumstances could exist which warrant a court, *sua sponte*, to reformulate a federal rule for purposes of a case or class of cases, neither opinion of the courts below demonstrate that such a case is here presented. That the two courts, in casting aside the literal language of the rule, emphasized different rationales *does* demonstrate that if the anchor of plain meaning is lifted, the rules could be cast adrift in a sea of competing, and perhaps conflicting rationales. Ultimately, uniformity in Federal procedure could be irreparably damaged by *ad hoc* exercises in rulemaking.

The district court relied upon a view of Rule 68's purpose ("to encourage settlements and avoid protracted litigation") which, it declared, compelled consideration of an element not included in the rule, that of "reasonableness." Pet. App. A. 11. The court did

[8] It should be noted as well that a substantial number of Title VII cases do *not* involve large, nationwide corporations that presumably are better able to pass the costs of such litigation on to consumers. The costs of mounting a successful defense may impact severely upon small and medium sized employers; thus, a procedural device like Rule 68 which promotes settlement may be critical to them.

not indicate whether the question of reasonableness could be litigated, with the likelihood of slowing down, rather than speeding up litigation. See pp. 8-9, *supra*. Moreover, the court gave no indication that its construction of Rule 68 would apply only under Title VII, and not to all kinds of cases.

On appeal, the Seventh Circuit arrived at the same result but concerned itself less with Rule 68 and much more with Title VII. Cases interpreting Rule 68 which the district court had found "supportive," *Perkins* v. *New Orleans Athletic Club*, 429 F. Supp. 661 (E.D. La. 1976), and *Honea* v. *Crescent Ford Truck Sales, Inc.*, 394 F. Supp. 201 (E.D. La. 1975), were brushed aside by the Seventh Circuit as providing "at best only inferential" support for the plaintiff's position. *Compare* Pet. App. A. 11 *with* 600 F.2d at 702. While the court of appeals expressed "fear" that token offers by defendants seeking "cheap insurance" against costs would damage the vitality of Rule 68, 600 F.2d at 701, its "liberal" reading of the rule was based largely upon the favored position of Title VII plaintiffs as reflected in the statute's counsel fee provision. Neither of these arguments, when examined, merit the court's disregard for the plain language of the rule.

The court of appeals' reliance upon the attorney's fee provision in Title VII is simply inapposite to the case here. That provision, 42 U.S.C. § 2000e-5(k) ("Section 706(k)"), which specifically permits the trial court "in its discretion" to allow the prevailing party a reasonable attorney's fee as part of the costs, concerns the consequences of *judgment* (like Rule 54(d)), not the consequences of an *offer* of judgment. In overlooking this distinction, the court of appeals

missed the purpose of the attorney's fee provision. It is intended not to encourage settlement, but, in the case of a prevailing plaintiff, to make recovery complete "*against a violator of federal law;*" in the case of a prevailing defendant, to protect it from "burdensome litigation having no legal or factual basis." *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 418, 420 (1978) (emphasis added). Read together, then, Rule 68 gives private parties an incentive to settle; if they cannot settle, only then does Section 706(k) of Title VII give the trial court the authority to award more complete relief to a party proved to have been wronged.

The courts' concern that a literal reading of Rule 68 will promote token offers of judgment is simply unfounded. Deterrence against token offers is built into the rule itself, for to have any realistic hope of benefiting from the procedure, the defendant must offer at least as much as it anticipates the plaintiff would be likely to recover in a judgment. Moreover, as the court in *Mr. Hanger* intimated, an offer of judgment, if accepted, might constitute an indication of wrongful conduct, 63 F.R.D. at 610. As a public judgment recorded against it,* no defendant, particularly a corporate one that is subject subsequently to individual and class Title VII actions from private individuals and EEOC, as well as compliance proceedings by the Office of Federal Contract Compliance Programs (OFCCP), 41 C.F.R. Part 60, would casually introduce token offers for the uncertain, and perhaps minimal benefits that would flow from cost awards under Rule 68.

* Accepted offers of judgment, because they become judgments, are more onerous than, and should be distinguished from offers of compromise without a finding of liability, Fed. R. Evid. 408, or unaccepted offers of judgment, evidence of which is not admissible except in a proceeding to determine costs. While offers of judgment presumably do not have issue preclusion effect, since issues are not litigated, they nevertheless would be on the public records, and could form a basis for triggering formal investigations by EEOC, OFCCP or State and Local enforcement agencies, or private plaintiffs or their counsel.

Interestingly, Rule 68 and Title VII together have been law for fifteen years, during which virtually all judicial precedent has supported a literal reading of the rule. *Mr. Hanger, Inc.* v. *Cut Rate Plastic Hangers, Inc.*, 63 F.R.D. 607, 610 (E.D.N.Y. 1974), *citing Staffend* v. *Lake Central Airlines, Inc.*, 47 F.R.D. 218 (N.D. Ohio 1969); *Nabors* v. *Texas Co.*, 32 F. Supp. 91 (W.D. La. 1940). Recorded instances concerning the rule's application in Title VII cases have been relatively few. *See Dual* v. *Cleland*, 79 F.R.D. 696 (D.D.C. 1978); *See generally*, Schlei and Grossman, *Employment Discrimination Law*, 1145-46 (1976). It thus would appear that defendants have exercised their rights under the rule with, if anything, a realistic degree of circumspection.

Ultimately, we believe, the most compelling reason for reading literally Rule 68 derives from the language itself. The rule need not be construed by injecting content not found otherwise, for the rule is unambiguous. If, as suggested by the Seventh Circuit, the Rule was meant to apply in all cases other than those concerning Title VII, an exception could have been provided for by the rulemakers. *See, e.g.*, Ark. R. Civ. P. 27-1501, which allows offers to be made only in actions for the recovery of money alone. If, as the Seventh Circuit declares, the rule was meant

to be read in the permissive, the rulemakers could have written the rule in the permissive. *See, e.g.*, Cal. Civ. Proc. Code § 998, *cited in Pomeroy v. Zion*, 19 Cal. App. 3d 473, 475, 96 Cal. Rptr. 822, 823 (1971). If good faith intent was meant to be an element in determining the rule's applicability, that too could have been included. See Note *Rule 68: A "New" Tool for Litigation*, 1978 Duke L.J. 889, 896. By its judicial redrafting, the district court and the Seventh Circuit have ventured well beyond the purview of proper rule interpretation.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
DANIEL R. LEVINSON
McGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

July 3, 1980